

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
MARY BUCKNER)
COARDES BUCKNER) BANKRUPTCY NO. 05-64898
)
Debtors)

MEMORANDUM OPINION AND ORDER

The Chapter 13 Debtors, Mary and Coardes Buckner (“Movants”), on May 9, 2006, filed a Motion to “Reconsider” the Order of this Court dated April 25, 2006, set out upon a separate document pursuant to Fed. R. Bk. P. 9021, and entered of record by the Clerk on the Docket on the 25th day of April, 2006, pursuant to Fed. R. Bk. P. 5003(a) (“Order”).

That Order granted the Motion to Enforce Settlement Agreement filed on March 9, 2006, by Bernice J. Belovich and Joseph F. Belovich (“Belovichs”) which was set for Final hearing on April 14, 2006, and to which both the Movants’ Counsel and the Movants failed to appear. No Motion to Continue said hearing was filed by the Movants. The Motion by the Movants alleges that at the time of the hearing the Debtor Coardes was hospitalized because of heart failure and could not appear at the hearing, and that the Movants’ Attorney has recently been diagnosed with Lupus and was hospitalized at Mayo Clinic. The Motion does not allege she was so hospitalized at the time of the hearing. The Debtor further asserts generally that the Order is erroneous as the Debtors never agreed to make a lump sum payment “or the 8 per cent interest”.

Said Motion is not accompanied by a separate brief or any appropriate affidavit or other materials in support of thereof as required by N.D. Ind. L.B.R. B-9023-1.¹ In addition, the Movants did not file a separate request for oral argument as required by N. D. Ind. L.B.R. B-7007-2(b), as made applicable by N. D. Ind. L.B.R. B-9023-1(c). Accordingly, the

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N.D. Ind. L.B.R. B-9023-1 provides as follows:

Post Judgment Motions

(a) Any motion filed after the entry of a final judgment or order, whether filed pursuant to Fed. R. Bankr. P. 9023 or Fed. R. Bankr. P. 9024, shall be accompanied by a separate supporting brief and any appropriate affidavits or other materials in support thereof. The failure to submit a supporting brief will be deemed a waiver of the opportunity to do so.

(b) Unless otherwise ordered by the court, no response to the motion is required.

(c) The provisions of N.D. Ind. L.B.R. B-7007-2 (oral argument on motions) apply to post judgment motions.

N.D. Ind. L.B.R. B-7007-2, as made applicable by N.D. Ind. L.B.R. B-9023-1, states as follows:

(a) Any motion filed within an adversary proceeding or a contested matter may be determined by the court without argument or hearing, following the expiration of the time for any response or reply provided for by these rules.

(b) A request for oral argument shall be filed separately and served along with any brief, response, or reply. The request shall specifically identify the purpose of the request and estimate the time reasonably required for any argument. The granting of any request for oral argument shall be discretionary with the court.

In addition, Fed. R. Bk. P. 9006(d) provides in part as follows:

When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

Fed. R. Civ. P. 59(c), as made applicable by Fed. R. Bk. P. 9023 states as follows:

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by parties' written stipulation. The court may permit reply affidavits.

Movants have waived any request for hearing and oral argument as to the Motion and the opportunity to submit a brief in support of their Motion.

The Belovichs on May 26, 1996 filed their Objection to the Movant's Motion to Reconsider.

The Bankruptcy Court no longer has an inherent power to reconsider its prior orders, rather its post-judgment reconsideration power is controlled by Fed. R. Bk. P. 7052 applying Fed. R. Civ. P. 52, Fed. R. Bk. P. 9023 applying Fed. R. Civ. P. 59, and Fed. R. Bk. P. 9024 applying Fed. R. Civ. P. 60. See In re Leiter, 109 B.R. 922, 924-25 (Bankr. N.D. Ind. 1990) (citing, Matter of Met-L-Wood Corp., 861 F.2d 1012, 1018 (7th Cir. 1988)).

The Order was a final appealable Order.² The Motion does not assert whether relief is being sought pursuant to Fed. R. Civ. P. 52, as made applicable by Fed. R. Bk. P. 7052 and Fed. R. Bk. P. 9014, Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023, or Fed. R. Civ. P. 60, as made applicable by Fed. R. Bk. P. 9024. The Federal Rules do not contemplate Motions to Reconsider. In re Curren and Sorenson, Inc., 57 B.R. 824, 827 (BAP 9th Cir 1986). However, the Motion does allege that the failure to appear at the

² Fed. R. Bk. P. 9001 "General Definitions" defines a "Judgment" at 9001(7) as "any appealable order."; Fed. R. Bk. P. 9002 relating to "Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases Under the Code", defines "Judgment" at 9002(5) as "any order appealable to an appellate court." Fed. R. Bk. P. 7054(a) which applies Fed. R. Civ. P. 54(a) defines a "judgment" to include a decree and any order from which an appeal lies. Fed. R. Bk. P. 9014, applies Fed. R. Bk. P. 7054 to contested matters also. The Order in issue falls within the foregoing definitions. For cases discussing what constitutes a final appealable order, see, e.g., In re Stoecker, 5 F.3d 1022, 1027 (7th Cir. 1993); In re Irvin, 950 F.2d 1318, 1319 (7th Cir. 1991); In re Official Committee of Unsecured Creditors, 943 F.2d 752, 755 (7th Cir. 1991); In re Unroe, 937 F.2d 346, 348 (7th Cir. 1991); In re Sandy Ridge Oil Co., Inc., 807 F.2d 1332, 1334 (7th Cir. 1986); In re Matter of James Wilson Associates, 965 F.2d 160, 166-67 (7th Cir. 1992).

hearing is based upon excusable neglect, which makes the Motion based upon Fed. R. Bk. P. 60 as made applicable by Fed. R. Bk. P. 9024.

Because the Order dated April 25, 2006 that was set out on a separate document pursuant to Fed. R. Bk. P. 9021 and entered on the Docket Sheet by the Clerk on the 25th day of April, 2006, pursuant to Fed. R. Bk. P. 5003(a), it was a Final appealable Order on April 25, 2006. Thus, the last day to file a Motion for a new Trial, or to Alter or Amend said Order pursuant to the ten (10) day period as set out in Fed. R. Civ. P. 59, as made applicable by Fed. R. Civ. P. 9023, was May 5, 2006.³ Because the Order was entered of record on the docket sheet by the Clerk on April 25, 2006, and became a final appealable order on that date, and the Motion was filed on May 9, 2006, or more than 10 days after the entry of the Order by the Clerk, the Court can only consider the Motion based on Fed. R. Civ. P. 60, as made applicable by Fed. R. Bk. P. 9024, as opposed to Fed. R. Civ. P. 59, as made applicable by Fed. R. Bk. P. 9023.⁴

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The time to file a Motion pursuant to Fed. R. Civ. P. 59 does not begin to run until the Judgment or Order has been both set out on a Separate Document pursuant to Fed. R. Bk. P. 9021, and the Judgment or Order is entered on the Docket Sheet by the Clerk pursuant to Fed. R. Bk. P. 5003(a). Only at that point is the Order a final appealable order. Fed. R. Bk. P. 9021 is an adaption of Fed. R. Civ. P. 58. Fed. R. Civ. P. 5003(a) is an adaption of Fed. R. Civ. P. 79. It should be noted that Fed. R. Bk. P. 9021 states that the reference to Fed. R. Civ. P. 79(a) should be read as a reference to Fed. R. Bk. P. 5003. Pursuant to Fed. R. Bk. P. 9021(a) a Judgment or Order is effective when entered pursuant to Fed. R. Bk. P. 5003(a). See Matter of Kilgus, 811 F.2d 1112, 1117 (7th Cir. 1987); Rosser v. Chrysler Corp., 864 F.2d 1299, 1305 (7th Cir. 1988).

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The United States Court of Appeals, Seventh Circuit, in the case of United States v. Deutsch, 981 F.2d 299 (7th Cir. 1992), adopted a "bright-line" test, and concluded that all substantive motions challenging a judgment on the merits served [now filed] within ten days of the rendition of the judgment fall within Rule 59, and all substantive motions to alter or amend a judgment served [now filed] more than ten days after entry of the judgment are to be evaluated under Rule 60(b). Thus, untimely Rule 59 Motions will be analyzed under rule

However, Rule 60(b) is not intended to correct errors of law made by the Court in the underlying decision which resulted in the final judgment. McKnight v. United States Steel Corp., 726 F.2d 333, 338 (7th Cir. 1985). A party “cannot avoid the time limits on filing an appeal by filing a Rule 60(b)(1) motion challenging the district court’s legal rulings and then appealing from a denial of that motion.” Id., (quoting, Bank of California, N.A. v. Arthur Anderson & Co., 709 F.2d 1174, 1178 (7th Cir. 1983)). The appropriate way to seek review of alleged legal errors is by timely appeal; a 60(b) motion is not a substitute for an appeal or a means to enlarge indirectly the time for appeal. Id., Kagan v. Caterpillar Tractor, 795 F.2d 601, 606 (7th Cir. 1986). Therefore, Rule 60(b) cannot be invoked by the Movant to attack any alleged error of law in the Order entered on the 25th day April, 2006.

The Court takes judicial notice that the Motion to Enforce Settlement Agreement by the Belovichs arose out of an Objection by the Belovichs filed on November 29, 2005 to the Confirmation of the Debtor’s Plan filed on September 2, 2005. A Prehearing Conference was held on said Objection on January 4, 2006, and the Belovichs’ Attorney reported to the Court that said Objection had been settled and that an Agreed Entry prepared by the Movants’ Attorney would be filed with the Court in 15 days. (See Docket Entry No. 26.)

When no Agreed Entry was filed as reported, the Court sua sponte issued an Order and

60(b), and substantive motions served [now filed] from the eleventh day on must be shaped to the specific grounds for modification or reversal listed in Rule 60(b). Id., 981 F.2d at 300-02. See also, Easley v. Kirmsee, 382 F.3d 693, 696 (7th Cir. 2004); Mares v. Busby, 34 F.3d 533, 535 (7th Cir. 1994).

Notice dated February 15, 2006 setting a Prehearing Conference on March 8, 2006 as to the present status of the reported Settlement Agreement and the possible enforcement thereof by the Court. The Counsel for Belovichs appeared at the Prehearing Conference. The Counsel for the Debtors failed to appear. The counsel for the Belovichs reported to the Court that he had heard nothing from counsel for the Debtors relating to the filing of the Reported Agreed Entry. The Court granted the Belovichs to and including March 21, 2006 to file a Motion to Enforce the Settlement Agreement as previously reported (See Docket No. 30).

As noted above, the Belovichs filed their Motion to Enforce Settlement Agreement on March 9, 2006, and an Order was entered on April 25, 2006 granting said Motion. This Order fully resolved the Objection to Confirmation of the Debtors' Plan by the Belovichs in finding that the Belovichs and the Debtors had reached a binding Settlement of said Objection, as alleged by the Belovichs in their Motion and accordingly, the Order constituted an Agreed Order modifying the terms of the Movants' Plan.

The Objection by the Belovichs having been resolved by said Order, the Court on May 1, 2006 set the Movants' Plan, as modified by the April 25, 2006 Order, for Confirmation Hearing on May 9, 2006, and an Order Confirming the Movants' Plan, as modified by said Order, was entered on May 9, 2006. The Movants filed their Motion to "Reconsider" on May 9, 2006, just prior to the Confirmation Hearing and the subsequent entry of the Order Confirming the Plan on May 9, 2006. The Motion to Reconsider by the Movants had not been transmitted by the Clerk to the Court prior to the Confirmation Hearing, and thus the

Court was unaware that the same had been filed when the Confirmation hearing was held and the Confirmation Order was entered. The Movants did not appear at the Confirmation Hearing to advise the Court that their Motion to Reconsider had been filed on May 9, 2006, nor did they file a Motion to Continue or Stay the Confirmation hearing pending their Motion to “Reconsider”.

The Movants did not file with their Motion to “Reconsider”, a Motion pursuant to Fed. R. Bk. P. 9014, that the Court direct that Fed. R. Civ. P. 62, Stay of Proceedings to Enforce Judgment, as made applicable by Fed. R. Bk. P. 7062 apply, together with a Motion to Stay the enforcement of the Order of April 25, 2006, or to stay the Confirmation Hearing pending the disposition of their Motion to “Reconsider” pursuant to Fed. R. Civ. P. 62(b). The 10 day Automatic Stay as to enforcement of the Order pursuant to Fed. R. Civ. P. 62(a) was not applicable at the time the Court held the Confirmation Hearing and entered the Order Confirming the Plan on May 9, 2006, as the Movants did not move that the Court direct that Fed. R. Civ. P. 62(a) apply pursuant to Fed. R. Bk. P. 9014. In any event, the 10 day Automatic Stay period had expired when the Confirmation hearing was held. Thus, because the enforcement of said Order was not stayed the confirmation Order was properly entered notwithstanding the fact the Movants had filed their Motion to Reconsider just prior to the Order Confirming the Movant’s Plan, and was a final and appealable Order. Matter of Wade, 991 F3d 402, 406 (7th Cir. 1993) Reh’g. den. Cert. den. 114 S.Ct. 195. The Confirmation Order was Res Judicata on all issues that were raised or could have been raised

prior to Confirmation. § 1327; In re Glow, 111 B.R. 209, 224 (Bankr. N. D. Ind. 1990). The Order Confirming the plan binds the debtor and each creditor to the terms of the Plan § 1327(a);. Matter of Casper, 154 B.R. 243, 246 (N. D. Ill 1993).

The Movants have not filed a Motion to Alter or Amend the Confirmation Order pursuant to Fed. R. Civ. P. 59, as made applicable pursuant to Fed. R. Bk. P. 9023, nor have they filed Notice of Appeal as to that Order pursuant to Fed. R. Bk. P. 8001. Thus, the Movant's Motion to Reconsider must be **DENIED** in that the enforcement of the Order dated April 25, 2006 was not stayed by the Debtor's Motion to Reconsider, and the Order of April 25, 2006 resolved the Objection to Confirmation by the Belovichs. Thus, the Court properly proceeded to hold the Confirmation hearing, and the subsequent Order confirming the Debtor's Plan on May 9, 2006, finally resolved all issues that were raised or could have been raised between the Movants and the Belovichs prior to Confirmation.

The next query is, whether assuming, arguendo that the Court should not have Confirmed the Debtor's Plan, because the Motion to Reconsider the Order of April 25, 2006 was filed just prior to the Confirmation hearing, any relief from said Order is only available to the Movants under Fed. R. Civ. P. 60(b), as made applicable by Fed. R. Bk. P. 9024. The Seventh Circuit has held that "[r]elief from a judgment under Rule 60(b) is an extraordinary remedy and is granted only in exceptional circumstances." United States v. One 1979 Rolls-Royce Comiche Convertible, 770 F.2d 713, 716 (7th Cir. 1985); C.K.S. Engineers, Inc. v. White Mountain Gypsum Company, 726 F.2d 1202, 1204 (7th Cir. 1983); Ben Sager

Chemical International v. Targosz & Co., 560 F.2d 805, 809 (7th Cir. 1977).

The Supreme Court's "excusable neglect" definition in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U. S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), is used in Rule 60(b) determinations. See Robb v. Norfolk & Western R. Co., 122 F.3d 354, 358-363 (7th Cir. 1997) (analyzing the broader meaning of excusable neglect after Pioneer). Generally, a movant must show three elements to obtain relief: (1) "good cause" for the default; (2) "quick action to correct it"; and (3) a "meritorious defense" to the complaint. Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994); Pretzel & Stouffer v. Imperial Adjustors, Inc., 28 F.3d 42, 45 (7th Cir. 1994); Breuer Electric Mfg. Co. v. Tornado Systems of America, Inc., 687 F.2d 182, 185 (7th Cir. 1982).

Although the Movants may have generally alleged "good cause" for the default in their Motion, the Movants filed no affidavits or other supporting materials to support their assertions as required by N. D. Ind. L.B.R. B-9023-1(a). There was no allegation that the Debtor Mary was precluded from attending the hearing, even though the Debtor Coardes may not have been physically able to attend. The attorney for the Movants did not specifically assert she was hospitalized at the time of the hearing, supported by an affidavit or other supporting materials, nor did the Movants state why they did not file a Motion to Continue the Hearing for good cause.

The existence of a "colorable defense" is sufficient to warrant the granting of a motion to vacate a default judgment where excusable neglect is shown. U. S. v. Forty-Eight Thousand

Five Hundred Ninety-five Dollars, 705 F.2d 909, 915 (7th Cir. 1983). The requirement that the defendant have a meritorious defense before a default judgment will be set aside is not satisfied by a mere recitation of the statutory language or phrase in the Federal Rules; the defendant must allege facts which if established at trial would constitute a complete defense to the action. United States v. \$55,518.05 in U. S. Currency, 728 F.2d 192, 195 (3rd Cir. 1984). A meritorious defense requires more than a “general denial” and bare “legal conclusions”. Pretzel and Stouffer v. Imperial Adjustors, Inc., 28 F.3d at 47 (quoting, Breuer Electric Mfg. Co. V. Tornado Systems of America, 687 F.2d 182, 186 (7th Cir. 1982)).

The Movants also did not sufficiently allege that they had meritorious defense to the Belovichs’ Motion. The Movants merely alleged generally that the Debtors “disagree” with the terms outlined in the Court’s Order of April 25, 2006, in that the Debtors did not agree to make a lump sum payment or to pay 8 per cent interest. They do not allege any specific, ultimate, or operative facts as to in what way the terms of the Settlement agreement alleged to have reached by the Belovich’s Motion to Enforce Settlement Agreement, were not those agreed to between the parties, i.e. they did not allege with any specificity in what way they believed it to be their understanding of the terms of the reported Agreed Entry that was contrary to the terms alleged by the Belovichs in their Motion. More than a general denial is required to show a meritorious defense.

The Motion by the Movants does not set out sufficient, factual or legal grounds to set aside the Order dated April 25, 2006, based upon Fed. R. Civ. P. 60(b). Accordingly, said

Motion is hereby **DENIED**. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Motion filed on May 17, 2006, by the Debtors for Relief from the Order of this Court entered on April 25, 2006, should be and is hereby **DENIED**.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: August 10, 2006



JUDGE, U.S. BANKRUPTCY COURT

Distribution

Debtors

Attorney for Debtors

Attorney Kvachkoff

Trustee

U. S. Trustee